No. 94-947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
TOWN & COUNTRY ELECTRIC, INC.
and
AMERISTAFF PERSONNEL CONTRACTORS, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF AMERICA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Are paid union agents or "salts" * considered "employees" within the meaning and for the unique purposes of the National Labor Relations Act?

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* AGC uses this term as the National Labor Relations Board has used it, to encompass full-time paid union organizers and officials, as well as those rank-and-file persons who receive a subsidy or other financial consideration for their salting efforts. Throughout this brief, AGC also uses the term "salts" to refer to all such individuals.

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INTEREST OF THE AMICUS CURIAE [1]

The Associated General Contractors of America ("AGC") is a non-profit trade association, representing approximately 33,000 general contractors and other firms in the construction industry. Many of its members have collective bargaining relationships with labor unions, and many others do not. Its members range from small family owned businesses to the largest contractors in the country. Collectively, they perform the majority of the construction

[1] Letters of consent have been filed with the Clerk in accordance with Rule 37.3.

of public and commercial buildings, highways, industrial and defense facilities, and municipal utilities in America.

Over the last five years, many of AGC's open-shop members have been confronted by paid union organizers, or "salts," and the labor problems stemming directly from their application for open-shop employment. Some of its members have also been targeted by a nationwide campaign, known as "Construction Organizing Membership Education Training" (commonly known as "COMET"). That campaign has generated a substantial amount of litigation before the National Labor Relations Board ("NLRB") and in various Courts of Appeals. Most of the unfair labor practice charges filed by unions under COMET involve either the refusal to hire or the discharge of salts, in alleged violation of the National Labor Relations Act ("Act"). It follows that the question presented by this case is of paramount importance to AGC.

In representing the interests of its members, AGC has appeared as an *amicus curiae* in selected cases of substantial interest to the construction industry, including the Fourth Circuit's decision in *H.B. Zachry Co.*, 289 NLRB 838 (1988), enf. den'd. 886 F.2d 70 (4th Cir. 1989); and the NLRB's consolidated hearing in this case and its companion case, *Sunland Construction Company, Inc.*, 309 NLRB 1244 (1992).

AGC has also participated in numerous cases in this Supreme Court, including, *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Erward J. DeBartolo Corporation v. NLRB*, 463 U.S. 147 (1983); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Building & Construction Trades Council v. Associated Builders and Contractors*, 113 S.Ct. 1190 (1993); and most recently, in *Adarand Constructors v. Pena*, No. 93-1841, cert. granted September 26, 1994.

AGC is submitting this amicus curiae brief in support of Respondents, urging the Court to affirm the Eighth Circuit Court of Appeals in the decision below, reported at 34 F.3d 625 (8th Cir. 1994).

STATUTORY PROVISIONS

Section 2(2) of the National Labor Relations Act ("Act"), 29 U.S.C. § 152(2) provides in relevant part:

> "When used in this Act—
>
> (2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 2(3) of the Act, 29 U.S.C. § 152(3) provides:

> "When used in this Act—
>
> (3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

SUMMARY OF ARGUMENT

Section 2(3) of the Act should not be construed to give union salts the rights and status that Congress reserved for bona fide "employees." Doing so would give the salts' true employers—the labor unions—a range of special privileges that the Act never intended unions to enjoy. It would also dramatically tip the balance between the competing interests of labor and management decidedly in favor of labor.

This Court's interpretation of Section 2(3) should reflect not only its wording, but also the common law of agency, and of course, the purpose of the Act. On at least three occasions, this Court has found it necessary to go beyond the literal statutory language of Section 2(3). In one case, the Court held that applicants for employment are "employees," although the statutory wording would not dictate that result. In the other two decisions, this Court excluded managerial and retired persons from the "employee" definition, although once again the literal wording would have dictated otherwise. In sum, this Court has recognized that the wording of Section 2(3) is an imperfect guide to its meaning, and that a completely literal approach would have consequences contrary to the Act's purposes.

In interpreting Section 2(3), the Court should look beyond the statutory language defining "employee" to "include any employee" to the common law of master-servant and agency, as discussed in Respondent Town & Country's Brief. However, should the Court decide to limit its interpretation of the Act without resort to the common law, industrial realities, or any other sources, full-time, paid union organizers are excluded from the Act's coverage because they are employed by a union, which is not an employer under the Act. Therefore, they fall within the last exception of Section 2(3).

Section 7 of the Act confers several rights on employees, including the right to *self*-organization, to engage in collective bargaining, and the right to refrain from any

or all of those activities. The Act seeks to create a delicae balance between the adversarial, conflicting interests of labor and management, to ensure that bona fide employees are not unfairly dominated by either. Unions have no Section 7 rights; yet, by engaging in the type of activity seen in this case, the unions are attempting to boot strap themselves into Section 7 protections, thereby destroying the Act's balance of power. The union salts in issue are clearly agents of the union, being instructed, directed, paid and subsidized for their organizing activity. Allowing the union salts to enjoy Section 2(3) status would further the union's institutional goals to the detriment of a contractor's bona fide employees and their Section 7 protections. Stripped to its essence, the International Brotherhood of Electrical Workers ("IBEW") wants Section 7 rights to further its institutional interests.

This case should not be considered in a vacuum. In the last two years, the construction industry has seen a very aggressive nationwide union organizing campaign, modeled in large part on the IBEW's salting program, called the Construction Organizing Membership Education Training Program ("COMET"). COMET utilizes thousands of union salts to exert economic pressure on open-shop contractors to accede to the union's demands. The COMET program has exacted enormous litigation costs from contractors, costs that must be absorbed even if those contractors' actions are ultimately found to be lawful. One of the cornerstones of the COMET campaign has been the NLRB's holding that the union salts are entitled to Section 2(3) protection.

Although organizing may be a goal, exacting enormous litigation costs from non-union contractors is also a primary objective of COMET. This strategy is designed to force the non-union contractor out of business or to accede to the union's demands.

Also, to confer employee status on union salts would allow the unions to "pack the unit" and skew any election results. It is uncontroverted that the union salts in the

case sub judice have been paid by the union for their allegiance and support. This is a case of money changing hands to influence votes, buy support, and obtain influence. The National Labor Relations Act was not intended to authorize or protect such practices.

Finally, if paid, full-time union agents are to be considered employees, an employer should still be free to reject them during an intense salting or COMET campaign due to the inherent conflicts of interest that would destroy the balance between unions and employers which the Act was designed to maintain.

ARGUMENT

I. THE LANGUAGE OF SECTION 2(3) IS AN IMPERFECT GUIDE TO ITS MEANING.

The Petitioner National Labor Relations Board ("NLRB"), the International Brotherhood of Electrical Workers, Local 292 ("IBEW"), and the amicus curiae supporting their position, belabor the obvious point that Section 2(3) is broadly worded. On that basis, they urge this Court to give the union salts the rights and status that Congress intended to reserve for employees. However, this Court has on at least three occasions found the wording of Section 2(3) to be an unreliable guide to its meaning.

In *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 61 S.Ct. 845 (1941), this Court held that the predecessor provision to Section 2(3) should be understood to include applicants for employment. Nowhere in the statutory language is the word "applicant" found; however, the Court had little difficulty in interpreting the provision to include "applicants." In *NLRB v. Bell Aerospace,* 416 U.S. 267, 94 S.Ct. 1757 (1974), the Court again found it necessary to go beyond the vocabulary of Section 2(3), holding that managerial employees were excluded from that section, even though such individuals could clearly fit within the literal definition. Similarly, in *Chemical Workers v. Pittsburgh Glass,* 404 U.S. 157, 166, 92 S.Ct. 383, 390 (1971), the Court held that

retired workers were not included within the meaning of "employee."

Chemical Workers warned that the NLRB's interpretations of the statute were not exempt from judicial review, and noted that its definitional sections, and Section 2(3) in particular, outline the types of employment covered, but do not provide an exhaustive list or a conclusive interpretation of the term "employee." 404 U.S. at 166-168, 92 S.Ct. at 390-392.

In *Chemical Workers,* the Court also reviewed the legislative history of Section 2(3), noting that the House of Representatives in 1947 intended "employee" to mean a person who would work for wages or a salary under direct supervision. (H.R. Rep. No. 245, 8th Cong. 1st Session, 18, 1947.) See *Chemical Workers v. Pittsburgh Glass,* 404 U.S. at 167-168, 92 S.Ct. at 391-392. The Court added, however, that "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning." 404 U.S. at 168, 92 S.Ct. at 392. The Court based its interpretation of Section 2(3), in part, upon its prior holding in *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 64 S.Ct. 851 (1944), where the Court had agreed with the Board's conclusion that newsboys were within the original definition of "employee," even though they may have worked for an independent contractor. Congress subsequently criticized the Court's decision in *Hearst Publications* and amended Section 2(3) in 1947 to exclude independent contractors. The fact remains, as the Court stated in *Hearst Publications,* that Section 2(3) "must be read in the light of the mischief to be corrected and the end to be attained." *Hearst Publications,* 322 U.S. at 124, 64 S.Ct. at 857.[3] The *Hearst Publications* comment regard-

[3] In *NLRB v. United Insurance Company of America,* 390 U.S. 254, 88 S.Ct. 988 (1968), the Court noted that the Congressional change to Section 2(3) was "to have the Board and the Courts apply general agency principles in distinguishing between employees and independent contractors under the Act." 390 U.S. at 256, 88 S.Ct. at 989-990.

ing a realistic approach to the interpretation of Section 2(3) is almost identical to the statement in *Chemical Workers* and makes perfect sense because, as this Court has held, the statute does not helpfully define the term.[4]

In related contexts, this Court has resorted to the common law to define the term "employee" if a statute provides little guidance. See, for example, *Nationwide Mutual Ins. Co. v. Darden,* 503 U.S. 518, 112 S.Ct. 1344 (1992) [interpreting the term "employee" in ERISA]. The same exercise should apply herein when trying to fathom the Congressional intent of Section 2(3) that: "The term 'employee' includes any employee . . ."

It would also be a mistake to analyze the common law of master-servant and agency without considering the Act's purposes. The Petitioner NLRB, the IBEW, and the amicus curiae discuss at great length certain common law principles of master-servant relationships, and the proposition that a person can simultaneously serve two masters if it would not require an abandonment of one to the advantage of the other.[5] The analysis of whether the union salts should receive the Act's protections should not be based entirely upon the statute's literal wording or common law principles. Rather, unless one actually analyzes the problem in the context of the Act's underlying purposes, an inequitable result will occur. In analyzing Petitioner's attempts to clothe the paid union salts with employee status, amicus AGC respectfully reminds the Court of one of its past admonitions:

> It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States,* 143 U.S. 457, 459. *National Woodwork Manufacturers Assn. v. NLRB,* 386 U.S. 612, 619 (1967). [*Connell Construction Co. v. Plumbers Local 100,* 421 U.S. 616, 628 (1975)]

[4] In *Nationwide Mutual Insurance Company v. Darden,* 503 U.S. 518, 112 S.Ct. 1344 (1992), the Court held that the National Labor Relations Act does not provide much, if any, guidance in the interpretation of "employee." See 112 S.Ct. at 1349, n.4.

[5] Of course, salts are always subject to the direction of their real employer—the union—to immediately abandon service to the open-shop contractors they are trying to organize.

When Congress passed the National Labor Relations Act, it did so with the purpose of minimizing industrial strife. In order to accomplish this basic purpose, Congress did not grant to either labor or management specific rights in Section 8, but rather regulated both parties' conduct towards those individuals entitled to protection under Section 7.

Thus, resort to the "plain meaning" rule of construction would be inappropriate given this provision's lack of statutory guidance and history. Although amicus AGC is mindful that the Court in *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 104 S.Ct. 2803 (1984) referred to the extreme breadth of Section 2(3), concluding that illegal aliens were in the protected class, this Court also can and should interpret the statutory language to avoid upsetting the very policies that underlie the Act. Including union salts within the statutory definition of "employee" would devastate the balance that Congress intended.

However, if this Court were to take a literal approach, it would have to conclude that paid union organizers are not employees because the final clause of Section 2(3) expressly excludes them. These organizers are employed by the IBEW, which is not an employer under the Act because Section 2(2) excludes a "labor organization (other than when acting as an employer)" from the definition of "employer." Being paid employees of a labor organization, which is not an employer, they are literally excluded by Section 2(3)'s exclusionary language because they are employed by a "person who is not an employer."

II. THE COURT'S INTERPRETATION OF SECTION 2(3) SHOULD PRESERVE THE DISTINCTION BETWEEN EMPLOYEES' PERSONAL INTERESTS AND UNIONS' INSTITUTIONAL INTERESTS.

In *Carpenters Union v. NLRB*, 357 U.S. 93, 99-100, 78 S.Ct. 1011, 1016 (1958), this Court recognized the balance in the NLRA "between the uncontrolled power of management and labor to further their respective interests." Section 8(a) of the Act regulates employer action, while Section 8(b) defines illegal acts of unions. By striking this balance, the Act sets forth the terms and conditions upon which unions and employers can compete for employees' preferences for or against union representation. This principle was most recently enunciated in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841 (1992), where the Court held that an employer was within its rights to bar non-employee organizers from its property. The Court determined that Section 7 of the Act granted rights to employees, not to unions or their non-employee organizers. 112 S.Ct. at 845.

Lechmere was grounded upon the prior decisions in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 92 S.Ct. 2238 (1972) and *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976), which rested, in turn, upon the Court's seminal decision in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679 (1956). Restricting non-employee organizing activities on an employer's property, the Court in *Babcock and Wilcox* warned that an employee's Section 7 rights and an employer's property rights "must be obtained with as little destruction of the one as is consistent with the maintenance of the other." 351 U.S. at 112, 76 S.Ct. at 684.

By conferring employee status on union salts, the NLRB destroys this delicate accommodation. In effect, a union can do indirectly what it cannot do directly. Under the NLRB's interpretation of Section 2(3), a union can infiltrate the employer's property by the use of paid representatives to do its organizing, when it would be

unable to engage in the same type of activity itself under *Lechmere* and its predecessors. According to *Lechmere*, a union organizer seeking access to a contractor's site can be turned away. However, according to the NLRB in this case, the union agent can then step into the nearest phone booth, shed his organizer suit, quickly change into his applicant (employee) clothes, and re-appear for a job. Under the NLRB's interpretation, he must now be accorded all rights of an employee and hired if otherwise qualified. This position exalts form over substance because the only variable between the union salt in this case and the union organizer in *Lechmere* is the different announcement that the person makes to management. In the former situation, the union salt simply states that he is seeking employment, as opposed to the union organizer in *Lechmere* stating that he wanted to enter the premises to organize the employees. This is a distinction without a difference.

As all parties concede, the persons for whom the Petitioner seeks protection are all *paid* to advance the union's institutional interests. It is, in this context, appropriate to ask a common sense question: Exactly who is seeking employment? There can be little doubt that under common law agency principles, the union salts in issue are agents of the IBEW. There is no question regarding the union's payments to the particular salts, nor is there any question that the salts sought employment that would be governed by the union's salting resolution.[6] In effect, the contractor was being asked to hire the union—the principal that would actually initiate the application process and establish the duration and other conditions of the salts' employment. It is the union that establishes the objective for seeking that employment. It is the union, not the individual union salt, or the contractor, who has absolute control over the individual. Yet, the union, as an institution, has absolutely no rights under Section 7

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[6] **The salting resolution is discussed below by the Eighth Circuit at 34 F.3d at 629, and is found in the Joint Appendix at page 256.**

or any other provision of the Act. As this Court held in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 845 (1992):

> Section 7 of the NLRA provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. § 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). By its plain terms, thus, the NLRA confers only on *employees*, not on unions or their non-employee organizers. (emphasis supplied).

By using the union salts in the manner sought herein, it is obvious that the IBEW was seeking an undue advantage, outside the scope of the Act's intention, and in direct derogation of this Court's *Lechmere* principle.

III. THE COMET CAMPAIGN REVEALS THE UNIONS' REAL PURPOSE AND OBJECTIVE.

The brief of amicus curiae International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmith, Forgers and Helpers, AFL-CIO ("I.B.B."), in support of the Petitioner, describes a union organizational campaign known as "Fight Back" on pages 1-4. The I.B.B. Fight Back campaign and the IBEW's salting resolution were the precursors to a nationwide union strategy announced at the AFL-CIO Building and Construction Trades Department's annual legislative conference on April 19-22, 1993. The national campaign, called the Construction Organizing Membership Education Training program ("COMET"), "is a form of stepped-up salting that uses rank-and-file members trained for this type of organizing."[7] It was reported in October, 1994 that nearly 40,000 members of the IBEW had completed a union training program under COMET, with the intention of

[7] Bureau of National Affairs, *Construction Labor Report*, Volume 39, No. 1928 (April 29, 1993), p. 231.

seeking employment on non-union construction sites and filing unfair labor practice charges with the NLRB if they were not hired.[8] The NLRB has been inundated with unfair labor practice charges filed by IBEW salts, as well as those from other unions.[9] These charges include refusal to hire and discharges when the union salt is terminated for any reason. A self-avowed goal of the COMET campaign is to cripple non-union construction companies by causing disruption in operations and forcing the expenditure of legal fees in order to combat the unfair labor practice charges.[10] The ultimate stated goal of the campaign is clear: either hire the salts or face expensive litigation. The unstated but clear objective is to force the non-union contractor out of business or capitulate to union demands without an election by the employees. As noted in ENR Engineering News-Record:

> Most nonunion contractors tend to be smaller firms and the building trades plan to wear down their resources by filing unfair-labor-practice charges with the National Labor Relations Board every time the companies make a mis-step under the National Labor Relations Act. The first charges out of the chute likely will be for contractor discrimination in not hiring union members and organizers just because of their union affiliation. 'Get right in their face' with union jackets and other insignias, ad-

[8] Bureau of National Affairs, *Daily Labor Report*, No. 207 (October 28, 1994), p. A-3.

[9] In its Petition for Certiorari at page 29, the NLRB advised there were 70 pending cases involving paid union organizers as of the time the Petition was filed. It is believed that number has increased. See also, "Union 'Salts' Infiltrate Construction Industry," by Robert Tomsho, Wall Street Journal, November 18, 1993, p. B1.

[10] The COMET program is discussed at length by Professor Herbert R. Northrup in his article "Salting the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance," Journal of Labor Research, Vol. XIV, No. 4, Fall 1993, pp. 469-492.

> vocated Rudicell [Director of organizing for the IBEW].[11]

The COMET campaign is grounded upon and advanced by the salting efforts of those individuals either employed full-time by the various unions or subsidized in some financial manner for their efforts, such as the individuals in the case sub judice. In his decision in *Sunland Construction Company, Inc.*, 309 NLRB 1224, 1246 (1992),[12] Administrative Law Judge Joel Harmatz succinctly summarized the danger of the I.B.B. Fight Back campaign (and by analogy COMET):

> It is not far fetched to regard the "strike back" strategy as built upon a form of entrapment reminiscent of other "blackmail" devices which in 1958 led to enactment of Section 8(b)(7) strictures on recognition picketing. It is true that neither picketing, nor secondary activity was directly involved here. Instead, the employee protections of Section 8(a)(3) were central ingredients of a scheme whereby an unorganized employer would be pressured to capitulate, go out of business, or face recurring union sponsorship of mass applications in the midst of future projects. From my perspective, a serious question arises as to whether, through the complaint in this proceeding, the Board has been conscripted as an unwitting conspirator in the effort to achieve union goals . . . through pressures, rather than through the statutory procedures designed to assure that compulsory bargaining begins with procedures preserving freedom of choice.

However, Judge Harmatz was constrained by prior Board precedent to accord the union salts the protections of Sections 7 and 8 of the Act by conferring upon them the "employee" status of Section 2(3).

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[11] ENR Engineering News Record, "Building trades plan big organizing drive," May 3, 1993, p. 6.

[12] *Sunland Construction Company, Inc.* was a companion case to *Town & Country Electric, Inc.* at oral argument before the National Labor Relations Board on March 18, 1992.

The issue of employee status under Section 2(3) is as central to the COMET campaign as it is to this case.[13] One cannot completely disregard the realities of labor-management relations and the goals of a salting effort. The following comment from the Fourth Circuit Court of Appeals in *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 74 (4th Cir. 1989) is undoubtedly true:

> The Board's contention that a paid union organizer is a bona fide applicant protected under the NLRA is even more plainly wrong when examined in light of the policy concerns underlying the Act. *The Act pre-supposes some degree of adversariness between employers and unions. In order to protect the right of employees to determine for themselves, free from undue interference from either employer or union, whether or not to unionize, the Act places limits on the context in which this adversariness operates.* (emphasis added)

Understood in this context, this Court should be wary that the unions are seeking to achieve objectives found to be clearly unlawful in *Lechmere*, usurping property rights and gaining access to an employer's property by means not authorized by the Act.

The Petitioner NLRB, the IBEW, and their amicus curiae make much of the salts' ultimate objective. They repeatedly assert that the salt's objective is to organize non-union employers and their employees. Surely, such an objective is at the very core of the Act's purpose. However, at least within the construction industry, there is considerable doubt as to whether organizing is the primary goal, or whether expensive litigation and possibly the imposition of backpay awards by the Board are the true objectives. The COMET campaign has not resulted in many petitions for elections, but rather numerous

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[13] It may be no coincidence that the COMET campaign was announced in April, 1993. The NLRB issued its *Sunland* and *Town & Country* decisions on December 16, 1992, giving tremendous support to the trade unions to increase their salting efforts.

unfair labor practice charges against contractors. The campaign is not about free choice for construction employees, but rather the subverting of NLRB processes to bully contractors—sign up or face charges.

Judge Harmatz, in his decision in *Sunland Construction Company,* was mindful of this problem in the construction industry, when he stated:

> I hold no illusions that there was genuine interest in securing organization of an employee majority on this project as contemplated by Section 9 of the Act. Thus, it is fair to infer that the Union was well acquainted with boiler outage work, and . . . must have known that the St. Francisville project was only about 2 months short of scheduled completion when the initial group of applications [by IBB salters] were submitted . . . . (t)he implication should have been clear to all; i.e., the organization of this short term project was too impractical to be a realistic goal . . . .
>
> [I]n formulating this plan, the Union would have been mindful that outage jobs are awarded pursuant to competitive bidding, that cost-wise, they are labor intense, that the price is fixed, and that completion delays are unacceptable. For these reasons alone, it was forseeable to a reasoned certainty that this 'merit shop [open-shop] employer' in such circumstances would avoid hiring those commended by the organizers . . . . There is little doubt in my mind . . . that backpay, rather than bona fide organization, was the cornerstone of its strategy. [309 NLRB at 1245-1246.]

As did Administrative Law Judge Harmatz, this Court has every reason to be suspicious when the Petitioner NLRB, the IBEW, and their amicus curiae argue that salting efforts only serve to uphold the Act's purposes of collective bargaining.[14]

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[14] As noted in Robert Tomsho's Wall Street Journal article, footnote 9, *supra,* "Wayne Devine loves to be fired. A pink slip is a badge of honor for the 33-year-old Jackson, Miss., electrician, who is part of a bold, new organizing campaign by the nation's construction unions."

If organizing is a highly debatable goal, then what purpose would it serve for the salts to actually work for a non-union employer? The answer reflects the basic conflict between an open-shop employer's interests and the unions' institutional interests. As the Eighth Circuit explained:

> When a union official applies for a position only to further the union's interests, we believe that an inherent conflict of interest exists. In this situation, the union official will follow the mandates of the union, not his new employer. If the union commands him to increase his organizational activities at his second employer's expense, he will do so. If the union asks him to quit working for his second employer, he will do so. Additionally, a union organizer in this position has a reduced incentive to be a good employee for his second employer. If he is terminated, he simply returns to his full-time union job. Indeed, he may even relish being discharged, because he then can file an unfair labor practice charge, claiming that he was terminated because of his organizing efforts. [*Town & Country Electric, Inc. v. NLRB,* 34 F.3d 625, 628-629 (8th Cir. 1994).]

Simply stated, the union salt has no real incentive to further the interests of the contractor; rather, his interest is to serve his union at all times. The short project duration gives greater weight to the argument that the salts' true objective is litigation, backpay, and disruption of the open-shop contractors' job progress by walkouts, slowdowns, and other means of interruption.

IV. THE PAID UNION ORGANIZER LACKS THE INDEPENDENCE OF A BONA FIDE EMPLOYEE.

As the Fourth Circuit made clear in *H.B. Zachry* and this Court reiterated in *Lechmere,* it is foolhardy to presume an absence of adversariness or animosity between

open-shop employers and unions.[15] Any examination of whether union salts deserve employee status under Section 2(3) must be viewed in that context. The Petitioner NLRB, the IBEW, and their amicus curiae argue that union salts are subject to the same work rules as any other employees, and are subject to discharge for any reason or no reason (except union activity). They maintain that the union salt is largely indistinguishable from the union zealot who actively campaigns for the union during his free time.[16] This argument assumes that a person can simultaneously serve two masters who have vastly competing interests. This position misses the mark, and is factually inaccurate.

First, there is no dispute that the union salts want the jobs in issue not for the job's sake, and the income that it can generate or the career opportunities it can provide, but rather for the ulterior motive of disrupting the non-union contractor. The union salt does not want the job—the union wants it for its own institutional purposes and assigns the salt the task of acquiring it and achieving those objectives. Although the Petitioner NLRB, the IBEW, and their amicus curiae argue that the employer has the right to voluntarily establish an employment relationship with any individual it desires (as long as there is no discrimination on the basis of some prohibited reason, such as union activity), who is the employer really being asked to hire? No employer should be forced to establish an employment relationship with an individual who is under third party control. Yet, that is the situation presented by union salts. Is there any analytical

[15] In fact, there is no difference in the relationship between the employer and the union that concerned the Court in *Lechmere*, and the relationship between the employer and the union salt in this case. As demonstrated above, the union salt is representing the union's institutional interests, and the *Lechmere* reasoning applies with equal force.

[16] This argument was raised by the District of Columbia Circuit of Appeals in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-1330 (D.C. Cir. 1992), cert. den'd 118 S.Ct. 1252 (1993).

difference between the union salt in this case and the situation in which a competitor plants its own employee with another company to serve its own particular interests? In the latter situation, it is inconceivable that any court would require the employment of the plant. Why, then, should the union salt receive such protection? Rather, the employer should have the right to voluntarily establish an employment relationship with anyone it desires (as long as there is no prohibited discrimination) without worrying that a third party competitor is actually regulating the relationship.

The issue of "control" is central to understanding the competing interests involved. The ultimate control of the union salts' employment duration and even obtaining employment at the non-union contractor lies not within the province of either the construction employer or the salt himself, but rather the union. The union salt owes his job, and the duration of his job, to the union, not to himself or the employer. This is simply not a natural employer-employee relationship as that term is commonly understood. The situation presented here is much different than the hypothetical situation posed by the D.C. Circuit in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), cert. den'd 113 S.Ct. 1252 (1993), when it could not conceive of a difference between the union salting situation and the union zealot who was not paid or subsidized by the union. Actually, the difference is glaring: in the former situation, the union is in absolute and ultimate control over the initiation, duration and termination of the employment relationship. In the latter situation, the union zealot is under no such control. He can work for as long as he desires, and cease his advocacy for the union without penalty, which the union salt plainly cannot do.

The practical distinction to the contractor is compelling. As noted by the Eighth Circuit below, the salting resolution in issue specifically provides that "such members, when employed by non-signatory employers, shall

promptly and diligently carry out their organizing assignments, *and leave the employer or job immediately upon notification." (Town & Country Electric, Inc. v. NLRB,* 34 F.3d at 629, emphasis added). There can be no question that as opposed to the union zealot, the salt can only work for the contractor for as long as he is allowed by his union. He has no practical choice but to leave the job under orders from his union employer. One can imagine the type of control and power that the union could thus exert in a typical job site situation when time for performance is normally of the essence.

Take, for example, a concrete pour that is scheduled for a particular time in a day. There would be nothing to prevent the union from ordering its salts to leave the job immediately before the concrete pour, thus rendering such work impossible and causing undeniable economic harm to the contractor. Assume, for example, emergency wiring that the IBEW salts might have to perform as part of their job duties. There would be nothing to prevent the IBEW from removing its salts at the very time that difficult, emergency wiring was scheduled to be done, thus endangering the job and possibly the safety of other workers. It is not enough for the IBEW, or any other construction union, to say that it would never do such a thing. The fact remains that under the salting resolution, it would have the full power to do so, and such a directive is certainly consistent with its objective of maximizing its economic and institutional strength against the non-union contractor whenever and wherever it chooses, for maximum leverage and benefit. The right to control a salt's job site activities and the duration of those activities lies at the very heart of the distinction between the union zealot and the union salt in the case sub judice and is the reason salting programs like COMET exist. The non-union contractor should have every right under the Act to enter into employment relationships with those individuals who choose to work for it of their own free will and accord, without outside, third-party control by

an admitted adversary employer with a clear conflict of interest. This is entirely consistent with both the Act and the common law on employer-employee relationships.

The IBEW (Brief, p. 44) and amicus IBB (Brief, p. 11) argue that the persons working for Town & Country, including the union salts, were at-will individuals, who could be terminated at any time for any non-proscribed reason, or they could have quit at any time for any reason; therefore, the issue of outside control should be of no moment to the contractor. The argument is unavailing for two reasons. First, it is fair and reasonable for an employer to expect a new hire to continue working for the foreseeable future, and for the employer to believe that any decision to leave will be *that person's decision, alone.* If there is any limitation upon the actual control of duration, it should be between the employer and the individual, not a third party such as a union. Even in the absence of an inquiry by the employer in the application process as to whether the employee truly desires to work for the foreseeable future, the employer would have every right to dismiss the employee subsequent to the hiring decision if the employer should find out that there is some limitation upon the employee's control over the length of employment. Yet, in the context of Section 8(a)(3) of the Act, if the employer should happen to discover that the union salt's job duration is actually controlled by the union, it would be illegal to discharge the individual on that basis alone if the salt were granted Section 2(3) protection. This would be grossly unfair and illogical. At-will employment means that the employer and employee control the duration of employment, not an outside agency, i.e. the union.

Second, the unions' interpretation of at-will employment status actually grants the salts an unfair measure of protection from discharge. In a true at-will situation, the employer can discharge the employee for any reason, or no reason. Clearly, federal and state statutes place restrictions upon any employer's right to discharge its

employees. The unions are well aware that Section 8(a)(3) of the Act prohibits a discharge on the basis of union activity or affiliation alone. In the context of unfair labor practice proceedings before the NLRB, although it is true that the general counsel must first prove that union activity was a motivating reason for any discharge,[17] in practice this burden is rather easily met. If an employer discharged a union salt for any reason or no reason (which would be its right under traditional at-will analysis), unfair labor practice charges would follow, and the employer would have to justify its decision based upon a permissible reason. This converts the at-will relationship to one that in effect requires just cause for termination. The employer could not terminate the union salt for any or no reason, as it could terminate other employees, without facing expensive litigation. There simply is no true at-will relationship between the employer and the union salt as that term is commonly understood.

Even if the employer terminates the union salt for poor performance, litigation surely follows. As the Eighth Circuit noted in *Town & Country,* one of the motives of the COMET campaign is to engage the employer in expensive litigation regardless of its merit and ultimately hope to win backpay awards. Proving poor performance before the National Labor Relations Board is certainly not as easy as the unions argue. However, even if the employer should prevail, it will have spent money and time on its legal defense.

The Petitioner NLRB, the IBEW, and their amicus curiae argue that an employer can legally avoid the possibility that the union may control the employment relationship by adopting a valid rule prohibiting temporary or concurrent employment. However, such a rule would

[17] *Wright Line,* 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert. den'd 455 U.S. 989, 102 S.Ct. 1612 (1982). The *Wright Line* burdens of proof were approved by the Supreme Court in *NLRB v. Transportation Management Corporation,* 462 U.S. 393, 103 S.Ct. 2469 (1983).

pose obvious problems for the contractor. First, fixing the duration of employment could convert the employment relationship into something other than at-will. In other words, the NLRB would in effect require the open-shop contractors to give up their right to employ individuals at-will. Furthermore, union salts might very well respond to such policies in a manner that does not disqualify them. For example, they may simply tell the employer that they are not seeking temporary or concurrent employment. Also, the unsuspecting non-union contractor could commit unfair labor practices in attempting to administer the very rules that the Petitioner NLRB and IBEW propose in their Briefs. Certainly, the contractor's inquiry would probably lead to unfair labor practice charges based upon unlawful interrogation. Even if the contractor had a facially neutral rule that prohibited simultaneous employment or third party control over the duration, there is nothing to prevent a union from filing unfair labor practice charges on behalf of the union salt if the person was not hired. If the charges provided meritless, the contractor would still incur legal expenses.

V. PAID UNION ORGANIZERS SKEW THE REPRESENTATION PROCESS.

Even if it were assumed that salts have a truly organizational objective, the Petitioner's arguments cannot withstand scrutiny. Affording the unions and their salts the status of "employees" ignores the law's primary purposes and frustrates Section 7's intent.

Section 8(a)(1) and (3) prohibits discrimination in hiring on account of union activities or the lack thereof. Since the employer may not use union or non-union status as a basis for hiring any person, neither the employer nor the union has any decided advantage in the Board's representational process under Section 9 of the Act. Rather, it will be the employees themselves, and their own particular individual preference, that will ultimately determine whether there will be union representation. Once employed, and having experienced the employer's

wages and employment practices, individuals can freely choose their fate. It should not be forgotten that Sections 1 and 7 of the Act are designed to grant employees the right to *self*-organization, to collectively bargain, and also to refrain from any of the listed activities.

Undoubtedly, an individual could have the same motive as a union, to work at the project only if it were organized. This would certainly be his or her right under Section 7 of the Act. It is an entirely different matter, however, for a *union* to pay individuals to flood a construction project with salts solely to advance the union's institutional interests. The union could skew the results of a representation election, at the expense of the bona fide employees' Section 7 rights.

Amicus ACLU argues for treating paid union agents or salts as employees because it promotes and facilitates self-organization (Brief of ACLU, pp. 12-13). To the contrary, union salts pack the unit with agents of another employer (the union) and can destroy the rights of the majority of true employees., who work only for the employer, to determine their employment future by selecting or rejecting a union. The employees' right to choose —or reject—a collective bargaining agent can be diluted by the voting power of the salts or union agents.

Petitioner NLRB has made it clear that it is unlawful for any employer to hire persons with the intention of obtaining a sufficient number of anti-union employees to out-vote those persons who favor a union. This organizational tactic is called "packing the unit" and has consistently been held to be illegal employer conduct. See, for example, *Airborne Freight Corp.*, 263 NLRB No. 181 (1982), enforcement den'd on other grounds 728 F.2d 357 (6th Cir. 1984); *Suburban Ford, Inc.*, 248 NLRB No. 51 (1980), enforced in part 646 F.2d 1244 (8th Cir. 1981); *C. Markus Hardware, Inc.*, 243 NLRB No. 158 (1979). This prohibition should be equally applicable to a union and its agents because under either scenario, bona fide employees are denied the self-organizational

difference between an employer's unit packing and what the union sought to achieve in the case at bar. In fact, the Fourth Circuit in *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 74-75 (4th Cir. 1989) was very mindful that salts could skew the results of any representation election, "saddling the bona fide employees with a union which a majority did not favor. If the practice here is accorded judicial approval, a union might command significant numbers of its employees to work for corporations in which elections are anticipated in order to skew the results." 886 F.2d at 74-75. The union's objectives in this case are even more nefarious because the union salts are in fact paid and subsidized for their efforts. This is truly a case of money changing hands in order to buy votes, support, and influence in the representation context.

In order to avoid this argument, the NLRB contends that it has rules to determine eligibility to vote in a representation election, and that the union salts could possibly be excluded from any election.[18] Petitioner NLRB argues that bargaining unit issues are different and totally distinct from employee status under Section 2(3). Although this argument may be academically correct, one can easily foresee and predict the litigation that will ensue if union salts are accorded employee protection and an employer seeks to exclude them from a bargaining unit on the basis of their "temporary" employment status.[19] Unless the rights afforded by Section 7 of the Act. There is no

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[18] The NLRB makes this argument in its decision below, 309 NLRB at 1256-1257.

[19] The NLRB has established very broad voter eligibility standards for the construction industry. The basic NLRB construction industry standard was stated in *Daniel Construction Company*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), and recently affirmed in *Steiny and Company, Inc.*, 308 NLRB No. 190 (1992). The *Daniel-Steiny* standards generally provide that construction workers are eligible to vote if they have been employed for thirty working days or more within the twelve months immediately preceding the eligibility date for the election or, if they had some employment in those twelve months, have been employed for forty-

NLRB chooses to engage in rule-making and exclude all union salts from the proposed bargaining unit in any representation election under Section 9, the temporary status and community of interest questions surrounding the salts must be litigated in every representation case. To make matters worse, the representation hearing would prove little, because the union salt cannot honestly testify about his or her future employment with the contractor, because the salt simply does not and cannot know when the union will direct the salt to quit.

Can the employer similarly plant its own paid officials or operatives in the bargaining unit to accomplish the same purpose as the union salts, i.e., placing extraordinary and undue strain upon the "true" employees in the unit? It is inconceivable that the Board would permit an employer to place its labor relations vice president or similar high-ranking official into the bargaining unit for the purpose of "organizing" the employees in an effort to defeat the union. It is similarly unbelievable that the Board would permit the employer to pay another person, or persons, to obtain the same objective as the union salts. Yet, what is the difference between this scenario and the one at bar? There is none.

Similarly, it would not be lawful for an employer to spy upon the union salts' activities. This would clearly violate established Board precedent under Section 8(a)(1) of the Act. Yet, by according Section 2(3) status to the union salt, the Board is allowing similar conduct by these individuals against management.

For these reasons, the balance sought by Congress between the conflicting concerns of labor and management in Sections 7 and 9 of the Act will be severely corrupted if the salts are accorded Section 2(3) employee status.

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five working days or more within the twenty-four month period immediately preceding the election's eligibility date. It would not be very difficult for a union salt employed on most construction projects to easily meet this standard.

VI. AN EMPLOYER SHOULD NOT BE COMPELLED TO HIRE PAID UNION AGENTS, EVEN IF THEY ARE HELD TO BE EMPLOYEES, DURING A SALTING OR COMET-TYPE CAMPAIGN.

Even if paid salts of the IBEW are considered to be employees within the definition of Section 2(3), contractors should not have to employ them due to the inherent conflict of interests and the destruction to the balance between unions and employers that the Act is designed to maintain. The NLRB in *Sunland Construction Company, Inc.*, 309 NLRB 1224 (1992), the companion case with Respondents' at the NLRB, held that a paid organizer was an employee under the Act, but that the employer could refuse to hire him during a strike.[20] The NLRB so held due to the conflict between an employer's interest in continuing operations and a union's interest in getting employees to withhold their services during a strike. There is little difference between the conflict during a strike and the constant threat, whether announced or not, that a union will direct its salts to stop working at crucial times during a construction project. Due to the dictates of the salting resolution, the salts must stop immediately when directed to do so.

In addition to the constant threat that union salts will be removed from the job site at the whim of the union, the whole purpose of salting in this case, as well as under the COMET campaign, is to create intense conflict with management. An example of the attitude which "good salts" should maintain is described in an organization manual entitled, *A Troublemaker's Handbook: How to Fight Back Where You Work—And Win!*, [A Labor Notes Book, Detroit, 1991], which states at page 9:

> Organizing begins when people question authority . . . . Organizing is about changing power relationships, changing the balance of forces between management and workers. Confrontation with the employer has to be built into the escalating activities.

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[20] 309 NLRB at 1230-1231.

In fact, the conflict during a salting campaign can disrupt a contractor's operations more than a strike.[21] Since the conflict is intense, it is implausible that Congress intended to require an open-shop contractor to employ a paid or subsidized union agent during a campaign designed to organize or harass the contractor while on its payroll.

VII. THE EIGHTH CIRCUIT'S DECISION IS WELL-REASONED AND UPHOLDS THE ACT'S PURPOSES.

Various Courts of Appeals have rejected the Board's interpretation of Section 2(3) as applying to paid union agents. The first such rejection occurred in *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). More recently, the Fourth Circuit has held that Section 2(3) does not include union salts. *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994). The Eighth Circuit relied heavily upon *H.B. Zachry* in this case. *Town & Country Electric, Inc. v. NLRB*, 34 F.3d 625 (8th Cir. 1994).

Both *H.B. Zachry* and *Town & Country Electric* provide detailed reasoning as to the logical exclusion of union salts from "employee" protection under the Act. In opposition to this viewpoint, the District of Columbia Court of Appeals decision in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), cert. den'd 113 S.Ct. 1252 (1993) provides the most cogent conflicting decision. The Second Circuit in *NLRB v. Henlopen Manufacturing Company*, 559 F.2d 26, 30 (2nd Cir. 1979) and the Third Circuit in *Escada (U.S.A.) Inc. v. NLRB*, 970 F.2d 898 (3rd Cir. 1992) enforced the Board's interpretation without significant comment.

In *Willmar Electric Service, Inc.*, the District of Columbia relied heavily upon the expansive meaning of "employee" generally, without any comment on this Court's decisions that have excluded classes of persons (retired

[21] For example, see Professor Herbert R. Northrup's article referenced in footnote 10 herein. See also, Robert Tomsho's article referenced in footnote 9.

employees, managerial employees) from protection.[20] The D.C. Circuit gave short shrift, without adequate consideration, to the fears expressed in *H.B. Zachry* that the inclusion of union salts in Section 2(3) would disrupt the representation process. However, as was noted in Section V above, the D.C. Circuit's belief that union salts could be omitted from the bargaining unit in any representation election is naive. If the true intention of the union salts is to organize the non-union employer, is it not reasonable to assume that the unions would insist upon the inclusion of such persons in the bargaining unit for any representation election?

The gravamen of the D.C. Circuit's analysis is its belief that there is no difference between a union salt and a typical union zealot who was employed by the non-union contractor and the fact that there was no question that the latter was protected by Section 2(3). (See 968 F.2d at 1329, 1330). However, as demonstrated herein, there is a fundamental difference between the union salt and the union zealot. The former is under the direct and ultimate control of his union, while the latter is not. A person can be a union zealot of his own free choice and volition; yet, that person also has ultimate control over his or her job performance, the duration of his or her

[22] The D.C. Circuit noted that concurrent employment by a union and employer could have been expressly authorized by Section 302(c)(1) of the Act, which generally exempts certain payments from an employer to an employee of a union from the general prohibitions of Section 302. Section 302(c)(1), 29 U.S.C. § 186 (c)(1) expressly excepts from the general payment ban a payment to an "employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer." However, the exception contained in Section 302(c)(1) obviously pertains to payments or benefits to a union steward or union employee who is employed under a collective bargaining relationship between the employer and a union. Simultaneous employment with an employer and a labor union typically occurs when a collective bargaining relationship has been established between the two sides, and a collective bargaining agreement is in place. However, Section 302(c)(1) does not offer support for the general proposition that union salts should be covered by Section 2(3).

employment, and for whom he or she may work. The union salt has no such control.

The very essence of an employer-employee relationship is that the employer expects the individual to work for an indeterminate period of time and will comply with the employer's supervision, while the employee decides whether working for the employer is in his or her best interest. When ultimate control over the employment relationship is not in the hands of the employer and employee, but rather the union, the foundation of this relationship vanishes.

The objective of the Act and the purpose of the NLRB are to protect the free choice of employees, not to protect or advance the interests of employers or unions. It is this balance, as well as the realities of the construction industry, that the Eighth Circuit recognized in its sapient decision below and sought to achieve. Amicus AGC submits that the Eighth Circuit's approach and decision is compatible with the Act, this Court's decision in *Lechmere,* and is a rational analysis of the problem presented by union agents masquerading as employees.

CONCLUSION

For the reasons stated hereinabove, amicus AGC urges this Court to affirm the judgment of the Eighth Circuit below, and to deny enforcement of the NLRB's order herein against the Respondents.

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